STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 25, 2008
v COREY EDWARD FRAZIER, Defendant-Appellant.	No. 275083 Wayne Circuit Court LC No. 06-009250-02

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v JOHN HENRY WILLIAMS, Defendant-Appellant.	No. 275589 Wayne Circuit Court LC No. 06-009250-01

Before: Servitto, P.J., and Hoekstra and Markey, JJ.

PER CURIAM.

Defendants appeal by right their convictions following a joint jury trial. This Court consolidated their appeals.[1]

In Docket No. 275083, defendant, Corey Edward Frazier was convicted of first-degree premeditated murder, MCL 750.316(1)(a), felony murder, MCL 750.316(1)(b), felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. The trial court sentenced Frazier as a fourth habitual offender, MCL 769.12, to life in prison for his first-degree premeditated murder and felony murder convictions, life in prison for his felon in possession of a firearm conviction and two years in prison for his felony-firearm conviction. We reverse that part of the judgment of

[1] Unpublished order of the Court of Appeals, entered October 9, 2006.

sentence ordering payment of attorney fees and remand for consideration of Frazier's ability to pay. Also, we remand for modification of the judgment of sentence to indicate one conviction and sentence for first-degree murder supported by the theories of premeditated and felony murder. In all other respects, we affirm.

In Docket No. 275589, defendant, John Henry Williams, appeals by right his conviction of felony murder.[2] The trial court sentenced Williams to life in prison. We affirm.

Both defendants made out-of-court statements to non-police witnesses that were admitted into evidence incriminating the other in the shooting. On appeal, both defendants argue that the admission of these statements violated their rights to confrontation under the Sixth Amendment. We review these constitutional claims de novo but because neither defendant effectively preserved this issue, our review is for plain error affecting substantial rights. *People v Pipes*, 475 Mich 267, 274-279; 715 NW2d 290 (2006). Even if Confrontation Clause error occurred and the issue were preserved for appeal, it is subject to harmless error analysis. *Id*. 276-277. Reversal is not warranted if the constitutional error is harmless beyond a reasonable doubt. *Id*. at 279-280 n 44; *People v McPherson*, 263 Mich App 124, 131; 687 NW2d 370 (2004).

The Sixth Amendment guarantees a criminal defendant the "right . . . to be confronted with the witnesses against him." US Const, Am VI; *Crawford v Washington*, 541 US 36, 42; 124 S Ct 1354; 158 L Ed 2d 177 (2004). The *Crawford* Court held that the Confrontation Clause does not permit the admission of out-of-court "testimonial" statements unless the accused has had a prior opportunity for cross-examination and the declarant is unavailable. *Id*. at 59, 68. In so doing, the Court rejected the constitutional test for admissibility of hearsay in the face of a Confrontation Clause challenge adopted in *Ohio v Roberts*, 448 US 56, 66; 100 S Ct 2531; 65 L Ed 2d 597 (1980), i.e., that the testimony must fall within a "firmly rooted hearsay exception" or bear "particularized guarantees of trustworthiness." *Crawford*, *supra* at 60-68.[3] The Court found that the *Roberts* test was both too broad, by applying close constitutional scrutiny to hearsay "far removed from the core concerns of the Clause," and too narrow, by admitting "statements that *do* consist of *ex parte* testimony upon a mere finding of reliability." *Id*. at 60. Thus, the Court held that nontestimonial hearsay does not implicate the Sixth Amendment. "Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law--as does *Roberts*, and as would an approach that exempted such statements from Confrontation Clause scrutiny altogether." *Crawford*, *supra* at 68.

The *Crawford* Court did not precisely define the line of demarcation between testimonial and nontestimonial out-of-court statements, leaving "for another day any effort to spell out a comprehensive definition of 'testimonial.'" *Id*. The Court noted several possible definitions of "testimonial" statements, *id*. at 51-52, but limited its holding to the facts of case before it, which involved the admissibility of a tape-recorded statement to the police the defendant's wife gave

[2] Williams was also charged but found not guilty of first-degree premeditated murder.

[3] Although the Court in *Crawford* did not explicitly state that *Roberts* was overruled, it clearly did so. See *Davis v Washington*, 547 US 813; 126 S Ct 2266, 2275 n 4; 162 L Ed 2d 224 (2006).

regarding an alleged criminal assault. "Statements taken by police officers in the course of interrogations," the Court held, are "testimonial under even a narrow standard." *Id*. at 52. The Court also observed that "testimonial" evidence would also include testimony at a preliminary hearing, before a grand jury, or at a former trial. *Id*. at 68. But the Court also suggested that "a casual remark to an acquaintance" is not a testimonial statement in the same way that an accuser making a formal statement to a government officer is. *Id*. at 51.

In *Davis v Washington*, 547 US 813; 126 S Ct 2266; 162 L Ed 2d 224 (2006), a case involving a 911 call reporting domestic violence and the resulting police response and investigation, the Court held that not all police interrogation will produce testimonial statements. The Court clarified that it held in *Crawford* that only "testimonial" statements "cause the declarant to be a 'witness' within the meaning of the Confrontation Clause." *Davis*, *supra* at 2273. "It is the testimonial character of the statement that separates it from other hearsay that, while subject to traditional limitations upon hearsay evidence, is not subject to the Confrontation Clause." In drawing this line, the Court again limited itself to the facts before it, opining:

> Without attempting to produce an exhaustive classification of all conceivable statements--or even all conceivable statements in response to police interrogation - - as either testimonial or nontestimonial, it suffices to decide the present cases [4] to hold as follows: Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution. [*Id*. at 2273-2274.]

Although addressing only police interrogation and leaving open "whether and when statements made to someone other than law enforcement personnel are 'testimonial'," *id*. at 2274 n 2, the Court in *Davis* nevertheless noted some past cases that applied the *Roberts'* reliability test in situations where "the statements at issue were clearly nontestimonial." *Id*. at 2275. Specifically, the Court cited, *Bourjaily v United States*, 483 US 171, 181-184, 107 S Ct 2775, 97 L Ed 2d 144 (1987) (involving tape-recorded statements made of one co-conspirator to a Federal Bureau of Investigation (FBI) informant admitted against another co-conspirator), and *Dutton v Evans*, 400 US 74, 87-89, 91 S Ct 210, 27 L Ed 2d 213 (1970) (a plurality opinion involving a statement by an alleged accomplice to another prisoner implicating the defendant).

Thus, under *Crawford* and *Davis* there is considerable doubt whether the statements at issue in the present case are "testimonial," and therefore subject to a Confrontation Clause challenge. The statements here were not the result of custodial police interrogation such as those in *Bruton v United States*, 391 US 123, 126; 88 S Ct 1620; 20 L Ed 2d 476 (1968), or *Pipes*,

[4] The companion case of *Hammon v Indiana* involved only a police investigation of a reported "domestic disturbance," not a 911 call. The alleged victim was required to fill out and sign a "battery affidavit" for the police. *Davis*, *supra* at 2272.

supra at 269, 272, to which Confrontation Clause analysis has not been affected by *Crawford*. *Pipes*, *supra* at 276, n 30. Rather, defendants made the statements at issue here to friends and acquaintances, the victim's brother, and during a conversation overheard by a fellow inmate. While this Court has deemed as testimonial a statement made to a non-police witness, it did so under a scenario where a neighbor wrote down what an alleged domestic violence victim related happened to her to preserve the statement for the police investigation of a possible crime. See *People v Walker (On Remand)*, 273 Mich App 56, 64-65; 728 NW2d 902 (2006). Here, no evidence indicated the police suggested or that the witnesses were acting as police agents. See *People v Jordan*, 275 Mich App 659, 663; 739 NW2d 706 (2007).

Each defendant failed to effectively preserve a Confrontation Clause issue. Although each raised the issue at the preliminary examination,[5] only defendant Williams moved to suppress defendant Frazier's out-of-court statement that implicated him. In his written motion, Williams asserted the hearsay was a testimonial statement only because Frazier made it to the victim's brother, Frazier was in jail at the time, and the statement shifted blame.[6] At oral argument on the motion, Williams' counsel argued only that the evidence was unreliable. Further, counsel for both defendants informed the trial court that their clients intended to testify at trial similarly to the out-of-court declarations but more exculpatory as to them. No violation of the Confrontation Clause occurs when hearsay is admitted at trial, and the declarant also testifies. *Crawford*, *supra* at 59, n 9; *Pipes*, *supra* at 275. Thus, Frazier failed to preserve alleged Confrontation Clause error by objecting in the trial court, and Williams failed to preserve alleged error by renewing his objection and moving for a mistrial when it became apparent that Frazier would exercise his right to not testify. *Id*. at 277-278.

Regarding Williams's challenge, there was evidence that Frazier called Gerald Gadie's brother and told him that while Frazier was in the bathroom at Gadie's house, he heard a gunshot. Frazier elaborated that when he emerged from the bathroom, he saw Williams holding a gun, and he and Williams "robbed" Gadie's house. Because the alleged constitutional error was not preserved, Williams must establish "that (1) error occurred, (2) the error was plain, i.e., clear or obvious, and (3) the plain error affected a substantial right of the defendant." *Pipes*, *supra* at 279, citing *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Moreover, reversal is warranted only when plain error results in the conviction of an actually innocent defendant or seriously affected the fairness, integrity or public reputation of judicial proceedings, independent of defendant's guilt or innocence. *Id*.

We conclude that defendant Williams has not met his burden of persuasion that plain error occurred, i.e., that Frazer's out-of-court statement was testimonial. Furthermore, defendant has not established the alleged error was outcome determinative. *Carines*, supra at 763. Kareemah Greer, Deville Thedford and Richard Peeples testified that Williams told them that while he and Frazier were trying to rob Gadie, he heard a gunshot when Frazier was in the

[5] Defendants asserted the statements were unreliable under the factors discussed in *People v Poole*, 444 Mich 151, 163-166; 506 NW2d 505 (1993), which applied the overruled reliability analysis of *Ohio v Roberts*, 448 US 56, 66; 100 S Ct 2531; 65 L Ed 2d 597 (1980).

[6] At the preliminary exam Frazier conceded the statements at issue were nontestimonial.

basement with Gadie. Williams also told Peeples that he called EMS after the shooting – once to report that someone was hurt in Gadie's house and a second time to report that there was a dead body in the house. Williams even indicated to Greer that he intended to turn himself in. Williams also told David Hornbuckle that he was in Gadie's house with Frazier and heard a gunshot while Frazier and Gadie were in the basement. In light of this incriminating evidence, it is apparent defendant has failed to establish that it is outcome determinative and that the admission of Frazier's statements implicating Williams in the murder were harmless beyond a reasonable doubt. Thus, even if this claim had been preserved, Williams is not entitled to relief.

Frazier claims that the admission of these same statements from Williams violated his right to confrontation. Frazier, like Williams, has not met his burden of persuasion that plain error occurred, i.e., that Williams' out-of-court statements were testimonial. Likewise, Frazier has not established his substantial rights were affected. Larry Oldham testified that while in the Wayne County Jail, he overheard Frazier instruct Williams to testify that he left the house before Gadie was killed because Frazier indicated he could handle this more easily since "I been [sic] through this before." Oldham also heard Frazier mention a dresser drawer that was pulled out and something being dumped out of a garbage bag.[7] Moreover, circumstantial evidence was presented at trial linking Frazier to Gadie's death. Specifically, evidence was presented that police discovered a nine-millimeter bullet casing near Gadie's body and that Frazier was known to carry a nine-millimeter handgun. Further, evidence was presented that bags of clothing were found torn open in the basement near Gadie's body, the drawers in Gadie's bedroom were open, and the house was messy. Although Frazier's statement to Gadie's brother is inconsistent with Oldham's testimony, it clearly incriminates Frazier. Thus, the admission of Williams' statements incriminating Frazier was harmless and did not violate his substantial rights.

Next, Frazier argues that the trial court erred in failing to grant a mistrial after the prosecutor elicited testimony that Frazier was a murderer. We disagree. "We review a trial court's decision to deny a motion for a mistrial for an abuse of discretion." *People v Dennis*, 464 Mich 567, 572; 628 NW2d 502 (2001). To the extent Williams alleges prosecutorial misconduct, we review this issue de novo to determine if the defendant was denied a fair and impartial trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001).

"A motion for a mistrial should be granted only for an irregularity that is prejudicial to the rights of the defendant and impairs the defendant's ability to get a fair trial." *People v Lugo*, 214 Mich App 699, 704; 542 NW2d 921 (1995). Here, Peeples testified that Gadie had a "business relationship" with Frazier, whom Gadie "kept . . . around for the muscle." When asked to explain this, Peeples elaborated that Gadie "[k]ept [Frazier] around because he knew that [Frazier] was a murderer . . . ." Frazier's counsel immediately objected. The trial court sustained the objection and ordered this testimony stricken from the record. Later, when the prosecutor asked Peeples if Gadie explained what Frazier would do for money, Peeples noted, "[Frazier] would kill somebody, because [Frazier] already said that [Frazier] beat a murder case." The trial court again sustained counsel's immediate objection and ordered this testimony stricken from the record. Frazier later moved for a mistrial.

[7] We note that Williams does not challenge Oldham's testimony regarding this issue.

The trial court did not abuse its discretion in failing to grant a mistrial. Although testimony that Frazier was involved in and tried for murder was prejudicial, it did not impair his ability to receive a fair trial. Indeed, this was a brief, passing reference. Further, the impact of this statement pales in comparison to the strong circumstantial evidence presented against Frazier as noted above.

Frazier argues that the prosecutor intentionally elicited Peeples's second reference to Frazier's involvement with murder. This argument fails. In evaluating issues of prosecutorial misconduct, this Court must examine the prosecutor's remarks in context, on a case-by-case basis. *Watson*, *supra* at 586. A prosecutor may not knowingly elicit inadmissible evidence. *Id*. But not every instance of the mention of an inappropriate subject before a jury warrants a mistrial. Specifically, "an unresponsive, volunteered answer to a proper question is not grounds for the granting of a mistrial." *People v Haywood*, 209 Mich App 217, 228; 530 NW2d 497 (1995).

In context, it does not appear that the prosecutor knowingly elicited the testimony at issue. Specifically, Peeples's answer that Frazier "would kill somebody, because he already said that he beat a murder case" was not responsive to the question posed: "Did [Gadie] ever express anything about what [Frazier] would do for money?" This question, on its face, did not ask about any prior bad acts, let alone any prior court proceedings. Thus, the prosecutor's line of questioning was not improper and was insufficient for the granting of a mistrial. Moreover, contrary to defendant's argument, the trial court instructed the jury to disregard any testimony that the court had ordered stricken. Thus, Frazier's claim fails.[8]

Frazier next argues that counsel was ineffective for failing to request a curative instruction regarding Peeples's testimony that Frazier was a murderer. We disagree. Claims of ineffective assistance of counsel involve a question of law which this Court reviews de novo. *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004). Because this issue is unpreserved, this Court limits its review to mistakes apparent on the existing record. *Id*. The United States and Michigan Constitutions guarantee a defendant the right to effective assistance of counsel. US Const, Am VI; Const 1963, art 1, § 20. To establish ineffective assistance of counsel a defendant must demonstrate that counsel's performance fell below an objective standard of reasonableness and that a reasonable probability exists that, but for counsel's errors, the result of the proceeding would have been different. *Jordan*, *supra* at 667.

In making this argument, Frazier notes that the trial court mistakenly told Frazier's counsel that it had provided a curative instruction regarding this matter. This is inaccurate as the court did, in fact, instruct the jury that it was not to consider any testimony that the court had stricken during the course of the trial. So, even though the court did not specifically reference Peeples's testimony, the court's instruction addressed this issue. Consequently, counsel's performance was neither objectively unreasonable nor outcome determinative. Moreover, even if counsel should have requested a curative instruction, his failure to do so was not outcome

[8] Frazier's argument that the statements implicated MRE 404(b) is moot as the trial court sustained Frazier's objection and ordered the testimony stricken.

determinative in light of the Frazier's own statements to Oldham and Gadie's brother and the strong circumstantial evidence that was presented against him. Thus, Frazier was not denied the effective assistance of counsel on these grounds.

Frazier also asserts that counsel erred by failing to move for a mistrial or object to Williams's incriminating statements after Williams declined to testify. This argument is without merit. As noted above, admission of Williams' incriminating statements was not outcome determinative. Consequently, Frazier was not denied the effective assistance of counsel on these grounds because a motion for mistrial or objection would not have affected the outcome of the trial.

Next, Frazier argues that his convictions of both first-degree premeditated murder and felony murder violate double jeopardy. We agree. We review a double jeopardy challenge de novo. *People v Herron*, 464 Mich 593, 599; 628 NW2d 528 (2001). Where a defendant is convicted of first-degree murder, felony murder, and the underlying felony, "to avoid double-jeopardy implications, the defendant receives one conviction of first-degree murder, supported by two theories [of premeditated and felony murder] . . . . The defendant thus receives one conviction and one sentence for having committed one crime." *People v Williams*, 475 Mich 101, 103; 715 NW2d 24 (2006). Double jeopardy was implicated in this case as Frazier was convicted of both first-degree premeditated murder and felony murder arising from the Gadies' death; therefore, we remand this case for the trial court to modify the judgment of sentence to reflect one first-degree murder conviction and sentence supported by theories of premeditated and felony murder.[9] *People v Bigelow*, 229 Mich App 218, 222; 581 NW2d 744 (1998).

Frazier next argues that the trial court's order and judgment of sentence requiring him to pay attorney fees was improper. We agree. This Court reviews this unpreserved issue for plain error affecting substantial rights. *Carines*, *supra* at 763.

When ordering a criminal defendant to reimburse attorney fees, a trial court must "provide some indication of consideration [of defendant's ability to pay], such as noting that it reviewed the financial and employment sections of the defendant's presentence investigation report or, even more generally, a statement that it considered the defendant's ability to pay." *People v Dunbar*, 264 Mich App 240, 254-255; 690 NW2d 476 (2004). In ordering the reimbursement the trial court should consider defendant's foreseeable ability to pay and may consider defendant's future earnings. *Id*.

Here, although the judgment of sentence and order for reimbursement requires Frazier to repay $1,610 in attorney fees, the trial court provided no indication that it considered Frazier's foreseeable ability to pay or future earnings. Therefore, we vacate that portion of the judgment of sentence and order and remand for reconsideration in light of *Dunbar*. On remand, an evidentiary hearing is not required, rather, "[t]he court may obtain updated financial information from the probation department." *Dunbar*, *supra* at 255 n 14.

[9] We note the trial court stated at sentencing that defendant received one life sentence supported by two theories but the judgment incorrectly listed two convictions for first-degree murder.

Next, Williams contends that the trial court erred in failing to grant his motion for a separate trial or separate juries. We disagree. This Court reviews a trial court's decision of whether to grant a motion for a separate trial or jury for an abuse of discretion. *People v Hana*, 447 Mich 325, 346, 351-352; 524 NW2d 682 (1994).

MCR 6.121(C) provides, "On a defendant's motion, the court must sever the trial of defendants on related offenses on a showing that severance is necessary to avoid prejudice to substantial rights of the defendant."[10] "The failure to make this showing in the trial court, absent any significant indication on appeal that the requisite prejudice in fact occurred at trial, will preclude reversal of a joinder decision." *Hana*, *supra* at 346-347. A defendant must show more than a mere inconsistency of defenses to warrant reversal on this issue; rather, the defenses must be antagonistic, mutually exclusive, or irreconcilable. *Id*. at 347-349. "A confession is not antagonistic for the purposes of determining whether to sever a trial where the confession of a codefendant incriminates both the codefendant and the defendant." *People v Harris*, 201 Mich App 147, 153; 505 NW2d 889 (1993). Further, incidental prejudice that inevitably occurs in a multi-defendant trial is insufficient to require severance. "The 'tension between defenses must be so great that a jury would have to believe one defendant at the expense of the other.'" *Hana*, *supra* at 349, quoting *United States v Yefsky*, 994 F2d 885, 897 (CA 1, 1993).

The trial court's finding that there was insufficient evidence of mutually exclusive defenses to support granting Williams' motion for either a separate trial or a separate jury was not an abuse of discretion. At trial, both Williams and Frazier presented similar defenses that the witnesses who recounted Williams's and Frazier's previous out of court statements were not credible. Additionally, neither defendant testified at trial, and Frazier's out of court statement to Gadie's brother did not incriminate Williams without also incriminating himself. Whereas Frazier's statement to Gadie's brother created the inference that Williams killed Gadie, Frazier admitted in this same statement that he "robbed" Gadie's house with Williams after Gadie was shot. So, defendants' defenses were not antagonistic, mutually exclusive, or irreconcilable. Thus, Williams has failed to show that he was entitled to a separate trial or separate jury.

Williams also argues that he was denied the effective assistance of counsel in three respects. First, Williams asserts that counsel was ineffective for failing to present his phone records that would have shown that Greer did not call Williams as she alleged. We disagree. It is presumed that defense counsel's decisions regarding what evidence to present or whether to call and question witnesses are matters of trial strategy that only constitute ineffective assistance of counsel if they deny a defendant a substantial defense. *In re Ayres*, 239 Mich App 8, 21-22; 608 NW2d 132 (1999). A substantial defense is one that might have made a difference in the outcome of the trial. *Id*. at 22.

Assuming the records would have revealed the information Williams alleges, this evidence would have made no difference in the outcome of the trial. Indeed, Peeples, Thedford and Hornbuckle testified that Williams provided information linking himself to the shooting.

[10] The determination of whether separate juries are appropriate is evaluated under the same standards as those for separate trials. *Hana*, *supra* at 351-352.

Moreover, Peeples's and Thedford's rendition of the information Williams provided in the phone call was nearly identical in every material aspect to Greer's rendition of her phone call to Williams. Thus, the failure to present phone records was not outcome determinative and did not deny Williams a substantial defense.

Second, Williams contends that counsel was ineffective because he would not allow Williams to testify at trial; however, the only record evidence contradicts this assertion. Indeed, as Williams admits, he waived his right to testify at trial. Further, Williams affirmed at trial that counsel had explained that he had the right to testify. Therefore, Williams has failed to establish a factual predicate supporting his claim. *People v Hoag*, 460 Mich 1, 6-7; 594 NW2d 57 (1999).

Third, Williams asserts that counsel was ineffective for failing to object to testimony that Williams and Gadie were involved in drug dealing because the evidence was inadmissible under MRE 404(b). This argument fails. Generally, evidence is admissible if it is relevant and inadmissible if it is not. MRE 402; *People v Taylor*, 252 Mich App 519, 521; 652 NW2d 562 (2002). Evidence is relevant if it has any tendency to make a fact of consequence more or less probable than it would be without the evidence. *Id*.; MRE 401.

Regarding the admissibility of other wrongful acts, MRE 404(b)(1) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

For evidence of other wrongful or criminal acts to be admissible under MRE 404(b), it must: (1) be offered for a proper purpose, i.e., one other than to prove the defendant's character or propensity to commit the crime, (2) be relevant to an issue or fact of consequence at trial, and (3) be sufficiently probative to outweigh the danger of unfair prejudice pursuant to MRE 403. *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993).

At trial, Thedford testified that Williams was involved in drug dealing with Gadie, and Hornbuckle explained that he would sell marijuana for Williams. Admission of this evidence did not violate MRE 404(b).

First, evidence that Williams was a drug dealer showed that Williams had a motive for robbing Gadie. Indeed, it was known that Gadie was a drug dealer and that someone had previously broken into Gadie's house and stolen marijuana. Additionally, Peeples testified that Gadie claimed Williams, who was involved in a "business relationship" with Gadie, owed Gadie money. In light of this, the fact that Williams was a drug dealer explains why Williams participated in this crime.

Second, the evidence was relevant because it made it more likely that Williams's confessions to Greer, Thedford, and Peeples were accurate. Third, the evidence was not unfairly prejudicial. "Evidence is unfairly prejudicial when there exists a danger that marginally

probative evidence will be given undue or preemptive weight by the jury." *People v Ortiz*, 249 Mich App 297, 306; 642 NW2d 417 (2001). Given the evidence linking Williams to Gadie's death, evidence that he was a drug dealer provided a reason for Williams's participation in Gadie's murder. The simple fact that this evidence was damaging does not render it unfairly prejudicial. *People v Mills*, 450 Mich 61, 74-76; 537 NW2d 909, mod 450 Mich 1212 (1995). Therefore, this evidence was admissible under MRE 404(b).

Consequently, because counsel is not ineffective for failing to make a futile objection, counsel's failure to oppose the introduction of this evidence did not deny Williams the effective assistance of counsel. Therefore, his claim fails.

We reverse that part of Frazier's judgment of sentence regarding attorney fees and remand this case for consideration of Frazier's ability to pay. Also, we remand for modification of Frazier's judgment of sentence to indicate a single conviction and sentence for first-degree murder supported by theories of premeditated and felony murder. In all other respects, we affirm.

/s/ Deborah A. Servitto
/s/ Joel P. Hoekstra
/s/ Jane E. Markey